arate unit would be. It showed that there would be a loss of substantial economies and additional cost to the rate-payers of Louisiana Power, which would result from the separation of the electric and gas systems, totalling $957,193 per year, of which $684,377 would be lost in the operation of the electric system (thereby increasing the cost to the electric customers in said sum), and $272,816 would be lost to the gas system (thereby increasing the cost to the gas customers in said sum). The analysis was based on a study of operations of Louisiana Power covering the year 1954. The Louisiana Commission attached to its Offer of Proof the opposition of the principal governmental officials of Louisiana, including the Governor of the State, officials of 28 of the 30 towns and communities served, and of 14 of the 15 parishes (counties) served by Louisiana Power.[3]

On July 7, 1955, a full and complete five-hour oral argument before the S. E. C. occurred in Washington, with minute consideration of the evidence and offer of proof, by counsel for the Louisiana Commission, the S. E. C. Staff, and the S. E. C. itself, resulting in the September 19, 1955 order. The Louisiana Commission, having been denied relief, sought a review of the order in a petition to the Court of Appeals for the Fifth Circuit. The divestiture by Louisiana Power of its gas properties has not yet occurred, and the Louisiana Commission is here doing everything in its power to prevent it, because it knows there will be a resulting increased cost to the customers of Louisiana Power of at least $957,193 annually, and because it knows the situation will be unique in Louisi-

[3] See Document No. 91, 92.

ana, for no other public utility in the State has been required to separate its gas and electric properties.

REASONS FOR DENYING WRIT.

The writ of certiorari prayed for by petitioner should be denied because (1) the decision below is correct, and (2) this is not a case justifying the granting of such a writ because (a) there is no conflict between decisions of Courts of Appeal, (b) no important question of Federal law is involved, and (c) these proceedings are at an interlocutory stage and review by this Court is not proper until the proceedings have been completed.

ARGUMENT.

1. The decision below is correct.

The Court of Appeals for the Fifth Circuit considered the questions presented in the Petition herein. It found that the order of September 19, 1955 is reviewable. The Court said (App. A of Petition, 28, 29):

> "The order here involved is not of the type dealt with in Wayne United Gas Co. v. Owens-Illinois Glass Co., 300 U. S. 131, but is an order based on a procedure specifically authorized by Section 79k (b) of the statute. This provision was availed of by the petitioner here by requesting that the record be reopened. The fact that the Securities and Exchange Commission considered the petition, suggested that petitioner file an offer of proof, considered the proof thus offered, and made a specific finding that 'no grounds for questioning our earlier conclusion . . . have been indicated'

demonstrates that the Commission considered this procedure as a petition to modify the earlier order. The order denying this request is expressly reviewable."

See also *Bowman v. Loporena*, 311 U. S. 262 (1940) where the Court allowed the filing, and after considering the merits, denied a petition for rehearing, but such consideration extended and enlarged the period for appeal. Also *Pfister v. Northern Illinois Finance Corp.*, 317 U. S. 144 (1942).

The procedure provided in Section 11 (b), under which the S. E. C. is expressly authorized to revoke or modify any order previously made under the subsection, and which provides for a review of "any order" made under this subsection, is an expressly provided means to prevent a separation of utility systems not warranted by the law or the facts. The forced separation of public utility systems provided for in the subsection is a severe and drastic provision, and the statute has wisely provided for revocation or modification of any order thereunder where the conditions warrant it.

The Court below also considered the S. E. C. construction of the provisions of Section 11 (b) (1) (A), that revocation or modification of an order under this section, upon a showing that "the conditions upon which the order was predicated do not exist", does not relate to a situation where there has been no change in conditions since the entry of the original order. The Court of Appeals held (App. A of Petition, 29, 30):

"The action of the Securities and Exchange Commission here indicates that it considered that it had the duty to consider the proof that related to the conditions that existed as of the time the earlier order was entered. The language of the statute does not precisely state whether the utility can ask for a modification of the earlier order by a subsequent showing that the facts were not as they were taken to be when the order was issued or whether a modification can be had only upon a showing that conditions have changed subsequent to the earlier order. The language is susceptible of the construction, however, that if, in fact, it can be shown that the conditions on which the order was predicated were not truly the actual conditions, then a modification may be sought and obtained. We hold that such modification may be based on the facts as they existed at the time of the order which is to be modified."

No inference can be drawn in support of the S. E. C. theory from its citation of *Central & Southwest Utilities Co. v. S. E. C.*, 136 F. (2d) 273-275. The case is not in point. There is likewise no support to the S. E. C. construction in *American Power & Light Co. v. S. E. C.* 329 U. S. 90, 121. The issue of whether or not changed conditions would be necessary to justify a modification or revocation under the section of the Act was simply not considered in the cited cases. Nor should the Court of Appeals be precluded from overruling earlier legal determinations by the S. E. C. in this case where they are clearly erroneous.

The S. E. C. construction that "loss of economies" relates (a) only to the additional system and (b) must be of such a nature as to cause such a serious economic impairment of the additional system that it would render it incapable of economic operation, was likewise considered by the Court of Appeals, which held (App. A, pp. 31, 32):

> "We think that the language of a statute should be construed, if possible, by taking the usual intendment of the words without reference to such aids to construction as the legislative history, which may be helpful only if the language itself is not clear.
>
> "Giving to the language of Section 79k (b) the meaning normally attributed to the words used, we think it quite clear that if, in fact, there is a loss of substantial economies either to the separated utility or to the parent company, then the proviso in clause A is satisfied, for in such event it is clear that 'each of such additional systems (here the gas system) cannot be operated without the loss of substantial economies (to the parent company) which can be secured by the retention of control by such holding company of such system.' Since the term 'loss of substantial economies' is not expressly restricted in the statute to the economies relating to the operation of the additional companies, but is in terms broad enough to include the loss of substantial economies to the holding company as well, it would require judicial legislation for the court to cut it down as contended for by the Securities and Exchange Commission".

The Court below also said, (App. A, pp. 32, 33):

> "We do not make any findings here contrary to those arrived at by the Securities and Exchange Commission. We do decide that in making its findings on the crucial question of loss of substantial economies the Securities and Exchange Commission refused to give weight to important facts which, if as alleged by petitioner, would have presented an entirely different picture."

As to the S. E. C. contention that the losses must cause such serious economic impairment of the additional system as to render it incapable of independent economic operation, the Court of Appeals interpreted the term "substantial economies" to mean "important economies", as was said in *North American Company v. S. E. C.*, 133 F. (2d) 148, 152. The Court found the S. E. C. concept as to what constituted "substantial economies" was "too rigid", and it held (App. A of Petition, p. 34):

> "The question of their importance must, of course, be determined by the bearing they have on the ability of the two systems to continue in the serving of the two commodities in general demand without substantial change in policy, serving practically in the same way, making substantially the same gains, suffering substantially the same losses."

The case was remanded to the Securities and Exchange Commission for its further consideration in the light of the opinion of the Court. We respectfully submit that this is where the case should go and the evidence be taken.

2. This is not a case justifying the granting of a writ because:

(a) There is no conflict between decisions of Courts of Appeal.

An attempt is made here to fit this case into a conflict of decision on the same points of law between the Courts of Appeal for the District of Columbia and the Fifth Circuit. The petition cites *Philadelphia Co. v. S. E. C.* 177 F. (2d) 720 (C. A. D. C.) and *Engineers Public Service Co. v. S. E. C.*, 138 F. (2d) 936 (C. A. D. C.) wherein that Court of Appeals said, at page 725, "We cannot say the Commission's understanding of the term, 'substantial economies' is wrong. We construed it similarly in the Engineers case." The Court of Appeals in the instant case held, however, on the question of whether losses of economies must be such as render the segregated system incapable of independent operation (App. A of Petition, pp. 33, 34):

> "We think neither case accepts the contention of the Securities and Exchange Commission that the words 'substantial economies' must be so construed. The Engineers Public Service Co. case says 'substantial economies must mean, as was said in North American Company v. S. E. C. (2nd Cir.) 133 F. (2d) 148, 152, 'important economies.' 'To be sure there was a dissent in which Judge Soper, who wrote the opinion, favored a reversal of the order of the Securities and Exchange Commission because he thought the undisputed facts constituted a showing of 'substantial economies.' The majority merely felt that the evidence was

not conclusive, and therefore declined to reverse the finding of the Commission. There was no specific holding by the court that the Commission's formula as to what was meant by 'substantial economies' was universally applicable. Much the same is true of the later decision in the Philadelphia Company case. There the court affirmed an order of the Securities and Exchange Commission, in which its limiting formula had been applied. The court there said 'substantial' is a relative and elastic term.' In the context of the particular case, the court then said: 'We cannot find the Commission's understanding of the term 'substantial economies' is wrong,'"

It is certain from reading the opinion in the Philadelphia Co. case, *supra*, that it was decided by the Court of Appeals for the District of Columbia solely on the basis of the facts presented, the court holding that it "could not review or reweigh the evidence beyond determining that the finding does or does not appear to be unreasonable." (p. 724). And at page 725, the Court said that, "Even if the Commission had set up an erroneously high standard of proof, no prejudice would have resulted, for the Commission did not think petitioner's case proved by any standard however low."

The Court will look in vain in the *Engineers* decision for language to support the S. E. C. view that the losses must cause a serious economic impairment of the system such as to render it incapable of independent economical operation.

There is no conflict between the two Courts of Appeal on this question of law, as we have pointed out. At

best, the language in the *Philadelphia* case is dictum, because the Court in that case pointed out (p. 725, footnote 23) that the S. E. C. did not think that petitioner's case had been proved or that the evidence and facts supported petitioner's claims but fell far short of establishing that substantial economies would be lost on segregation. It found that the principal witness' studies were entitled to little or no weight. Thus the case was decided on its particular facts, which are greatly at variance with the facts in the present case.

Nor is it true that the *Philadelphia Company* and *Engineers* cases are in conflict with the present case on the question of whether loss of substantial economies must relate only to the loss to the additional system sought to be retained and not to any loss of economies to the retainable principal integrated system. In the petition herein the S. E. C. states that the Court of Appeals for the District of Columbia "presumably" accepted this construction. But it cannot find any language in the decision which supports the argument, for there is none. The same is true in the *Engineers* case, where the S. E. C. in its petition states that the same Court of Appeals "appears" to have applied this construction. To the contrary, in the *Engineers* case (p. 944) the Court held that the S. E. C. could not legally permit the continued control of "Virginia Gas" by "Virginia Electric" unless it could be found from the evidence that "such continuing strength would not entail a sacrifice upon the part of the controlling utility". The Court of Appeals for the Fifth Circuit discussed the question and held (App. A of Petition, p 32):

> "Neither the legislative history, if we are to consider that, nor the one court decision, relied on

by the respondent, discussed this precise point. We cannot permit our conclusion as to the correct construction of the Act to be overborne by discussion by another court of other features of the Act from which a contrary construction can at most only be inferred. This is too important a part of the section to be interpreted by such method. Furthermore, while we recognize the merit of respondent's contention that the interpretation placed on a law by the agency enforcing it is persuasive, no one will contend that it is not, after all, the duty of the courts to construe the acts of Congress, even if such construction differs with long accepted administrative policy."

It is not in every case involving an undisputed conflict that this Court will grant certiorari. Where the cases are clearly distinguishable, certiorari should not be granted. 66 Harv. L. Rev. 465, 466.

(b) No important question of Federal law is involved.

The present case has importance to the Louisiana Public Service Commission, which is attempting to save the rate-payers and customers of Louisiana Power & Light Company a considerable sum each year which would result from a segregation of the electric and gas systems. But it does not have general or important significance elsewhere. This matter should be determined and can be decided on the specific facts existing here.

Petitioner seeks to justify the granting of this writ by pointing out that there are outstanding four other uncomplied with Section 11 (b) (1) orders directed to registered holding companies. Petitioner fails to point out,

however, where there is any similarity whatsoever in the facts or conditions in these cases. In fact, the S. E. C. singles out only one of these cases, namely, Eastern Utilities Associates, as having the problem of whether or not there will be a "loss of substantial economies" within the meaning of Clause (A). But the facts in the Eastern Utilities case are clearly dissimilar from those here. The argument of the S. E. C. does not apply here because the facts in the instant case and in the cited cases are different. The holding of the Court of Appeals in the present case is a holding based upon a peculiar set of facts and circumstances in the problem of "loss of substantial economies" which occurs in a separation of electric and gas systems of Louisiana Power. The reasons which led the Fifth Circuit to remand this case for further proceedings on the ground that the facts developed in such further proceedings might result in a determination that the gas properties are retainable, are not pertinent to the four cited cases.[4]

[4] **Cities Service Company**, 17 S. E. C. 5, involved a Sec. 11 (b) (1) proceeding. There the S. E. C. had already determined that Cities must divest itself of either its utility properties or its non-utility properties, but could not retain both. Cities thereupon, on its own motion, accepted the Order of the S. E. C. and stated in its motion that "Cities has concluded not to appeal from the order entered herein and has elected to retain its oil, wholesale natural gas, and other non-utilities businesses intact. . ." Regardless of the outcome of the instant proceedings, there could be no re-activation of the Cities Service matter.

Commonwealth & Southern Corp., 26 S. E. C. 464, was a Sec. 11 (e) proceeding (a voluntary application by the Holding Company suggesting the means of divestiture) approved by the S. E. C. Nothing therein could possibly be affected by these proceedings.

Eastern Utilities Associates, 31 S. E. C. 329, was primarily a Sec. 11 (b) (2) proceeding. Insofar as Sec. 11 (b) (1) was pertinent, the evidence submitted by the holding company was directed

The issue here is a narrow one and on these facts the Court below was clearly right.

It is interesting to note that in the S. E. C. annual report for the year 1952, at page 82, the Commission said that, "It is now possible to state that the task of bringing about compliance with Section 11, which had its real beginning in 1940, is rapidly nearing completion."

(c) These proceedings are at an interlocutory stage and review by this Court is not merited until the proceedings have been completed.

The judgment of the Court below simply remanded this case to the S. E. C. for further proceedings, the Court stating in its opinion as quoted above:

> "We do not make any findings here contrary to those arrived at by the Securities and Exchange Commission. We do decide that in making its findings on the crucial question of loss of substantial economies, the Securities and Exchange Commission refused to give weight to important facts which, if as alleged by petitioner, would have presented an entirely different picture."

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primarily at speculative construction costs that separation would bring about, and secondarily to increased operating costs. As to this latter evidence, the S. E. C. found it defective and without basis. The Order was promulgated on April 4, 1950, and could hardly be the subject of reopening now. . . unless the "conditions upon which the order was predicated do not exist," in which case the matter should be reopened according to the Act.

Philadelphia Company, 28 S. E. C. 35, has been appealed to the U. S. Court of Appeals for the District of Columbia, 177 F. (2d) 720, and there affirmed. Regardless of the ultimate holding in this matter, the **Philadelphia** case is res judicata on its particular facts and no reopening would be available.

It would appear from the above that only the relatively small gross gas plant of Blackstone Valley Gas & Electric Company could conceivably be affected by the Fifth Circuit's decision.

The Court should not consider the writ of certiorari at this stage of the proceedings because only an interlocutory decree of the Court of Appeals is now at issue. The Petitioner cites *U. S. v. General Motors Corp.*, 323 U. S. 373, and *Land v. Dollar*, 330 U. S. 731, as authority for the granting of certiorari now. In *Land v. Dollar*, injunction proceedings were involved and it was necessary that certiorari issue to prevent irreparable damage. The facts in *U. S. v. General Motors Corp.* indicated that such a fundamental constitutional question, involving the power of the sovereign to expropriate without just compensation, was involved that it could not be cured later when the proceedings below were concluded. Generally, the cases emphasize that certiorari should not be issued to review interlocutory judgment except in extraordinary matters, and where the issue involved is not a final one it is usually sufficient ground for denial of the application for certiorari. As was said in *American Construction Co. v. Jacksonville, Tampa & Key West Railway Co.*, 148 U. S. 372:

> "Clearly, therefore, this Court should not issue a writ of certiorari to review a decree of the Circuit Court of Appeals on appeal from an interlocutory order unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the case."

See, also, *Robertson & Kirkham "Jurisdiction of the Supreme Court of the United States"*, Sec. 130, pp. 232-234. It is submitted that all the issues, both procedural and substantive, which petitioner challenges in its petition for certiorari may be passed on by this Court on review of a final decree of the Court below.

CONCLUSION.

It is respectfully submitted that the petition for certiorari is without merit for the reasons shown herein and should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 466.

SECURITIES AND EXCHANGE COMMISSION,

Petitioner,

v.

LOUISIANA PUBLIC SERVICE COMMISSION, MIDDLE SOUTH UTILITIES, INC., and LOUISIANA POWER & LIGHT COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR MIDDLE SOUTH UTILITIES, INC.

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BRIEF FOR MIDDLE SOUTH UTILITIES, INC.

Opinions Below.

The opinion of the Court of Appeals (R. 134-142) is reported in 235 F. 2d 167. The findings, opinion and order of the Securities and Exchange Commission dated March 20, 1953 (R. 103-128) and those dated September 13, 1955 (R. 129-134) have not as yet appeared in the official SEC reports, but have been published as SEC Holding Company Act Releases Nos. 11782 and 12978, respectively.

Jurisdiction.

Jurisdiction of this Court was invoked under 28 U. S. C. §1254(1). Certiorari was granted December 3, 1956 (R. 144), 352 U. S. 924.

Question Presented.

The question at issue between the Securities and Exchange Commission (herein called the SEC) and Middle South Utilities, Inc., and the only question dealt with by this brief, is whether the SEC is correct in its contention (SEC brief, p. 47, n. 47) that the court below erred in providing in its opinion as follows (R. 142):

> "The further consideration to be given to this matter by the Securities and Exchange Commission is restricted to the relations between Middle South, the Louisiana Power and Electric [Light] Company and the gas system, and nothing said in this opinion shall be taken to authorize a reconsideration of any other features of the March 20, 1953 order."

Summary of Argument.

The substantial question at issue between the Public Service Commission of Louisiana and the SEC is whether the gas properties of Louisiana Power & Light Company should be disposed of by that company. Louisiana Power & Light Company is an operating company in the Middle South system, which has been determined by the SEC to be an "integrated public-utility system" under the Public Utility Holding Company Act of 1935 (herein called the Act*). No appeal was taken from that determination within the time allowed for appeals. The SEC contends that if it is to consider the retention of the Louisiana gas properties, it must reopen the whole question of whether or not the Middle South system constitutes an integrated public-utility system under the Act. Middle South Utilities, Inc. disagrees.

* 15 U. S. C. §§79-79z-6.

The argument of Middle South Utilities, Inc., in brief, is that, although the gas properties of Louisiana Power & Light Company are important to it, they constitute a relatively unimportant part of the properties of the Middle South system and produce a relatively small part of its operating revenues; that the investments of tens of thousands of stockholders of Middle South Utilities, Inc., who look to the Middle South system as a system for income on their investments, should not be put at hazard merely in order to determine a question respecting these gas properties; and that the retainability of these gas properties can and should be determined without jeopardizing the integrity of the Middle South system integration order.

POINT I.

It is not Necessary for the SEC, in Carrying Out the Mandate of the Court of Appeals, to Reopen the Broad Question of Whether or not the Middle South System is an "Integrated Public-Utility System" Under the Act.

Middle South Utilities, Inc. is a public utility holding company. It owns all the common stock of Louisiana Power & Light Company, which in turn owns the gas properties constituting the subject matter of the present appeal. Middle South Utilities, Inc. also owns all the common stock of Arkansas Power & Light Company and Mississippi Power & Light Company and 95.2% of the common stock of New Orleans Public Service Inc. (R. 104-105).

On March 20, 1953, the electric utility properties of the four operating companies in the Middle South system were held by the SEC to constitute an "integrated public-utility system" within the meaning of Section 2(a)(29)(A) of the

Act (R. 103-128, especially 115). No appeal was taken from that order and the time to appeal has expired.

The order contained the following direction (R. 128):

> "It Is Ordered, pursuant to Section 11(b)(1) of the Act, that Middle South [Utilities, Inc.] and its subsidiaries dispose or cause the disposition of their direct and indirect ownership in the non-electric properties owned by Arkansas [Power & Light Company], Louisiana [Power & Light Company] and Mississippi [Power & Light Company] in any appropriate manner not in contravention of the applicable provisions of the Act or the Rules and Regulations promulgated thereunder."

On the application of Louisiana Power & Light Company a proceeding was commenced before the SEC in November, 1954, designed to bring about compliance by that company with the foregoing direction (SEC Holding Company Act Release No. 12740). In that proceeding the Louisiana Public Service Commission filed a petition asking the SEC to reopen the prior proceeding which led to the 1953 order and to reconsider the question of whether Louisiana Power & Light Company might retain its gas utility properties (R. 89-93). The SEC denied such request (R. 129-134) and, on a petition for review (R. 63-67), the Court of Appeals for the Fifth Circuit granted the petition and remanded the cause to the SEC for further consideration in the light of the opinion of the court (R. 134-143).

For purposes of the instant brief and to avoid repetition, Middle South Utilities, Inc. adopts the summary of the directions in the lower court's opinion set forth at pages 9 and 10 of the brief for the SEC. In general, those directions require the SEC to consider the retainability of the Louisiana gas properties in the light of standards specified by the court.

The breadth of action required of the SEC in carrying out the court's directions must be determined with reference to Section 11(b)(1) of the Act. Section 11(b)(1) says that it shall be the duty of the Commission to require holding companies to limit their operations to a single integrated public-utility system, and then continues with a proviso as follows:

> "*Provided, however,* That the Commission shall permit a registered holding company to continue to control one or more additional integrated public-utility systems, if, after notice and opportunity for hearing, it finds that—
>
> "(A) Each of such additional systems cannot be operated as an independent system without the loss of substantial economies which can be secured by the retention of control by such holding company of such system;
>
> "(B) All of such additional systems are located in one State, or in adjoining States, or in a contiguous foreign country; and
>
> "(C) The continued combination of such systems under the control of such holding company is not so large (considering the state of the art and the area or region affected) as to impair the advantages of localized management, efficient operation, or the effectiveness of regulation."

It has been the consistent position of Middle South Utilities, Inc. that it is not necessary to re-examine the Middle South integrated system as a whole in order to make a determination regarding the retainability of the Louisiana gas properties, but that the only question is whether the retention of such gas properties, constituting a comparatively minor asset, would result in non-compliance with

clauses (A), (B) and (C) of Section 11(b)(1). That was the holding of the court below (R. 142).

On the other hand, the SEC takes the position (SEC brief, p. 47, n. 47) that, in order to comply with the judgment of the court below, the SEC should be free to reconsider the status of the entire Middle South system under Section 11(b)(1), thus unsettling all the issues which were set at rest after complex proceedings only four years ago (R. 103-128).

Middle South Utilities, Inc. has over 25,000 stockholders.* They look to the Middle South system as a system for the income on their investments. It is unnecessary and it would be obviously unfair after only four years to put their entire investment at hazard merely in order to decide a question relative to gas properties which constitute only 1.6% of the system's aggregate gross property account (R. 123) and produce only 3.4% of the system's total revenues (R. 125). If the decision of the Court of Appeals stands, and even if its ultimate enforcement should result in the retention by Louisiana Power & Light Company of its gas properties, the investments of the Middle South stockholders could not be disturbed, since they would be merely permitted thereby to retain their existing investments in the same properties. On the other hand, an unsettling of the entire integration order could be most unsettling to their investments. Confronted with such a threat, they are entitled to invoke the doctrine expressed and followed by this Court in *International Union of Mine, Mill & Smelter Workers* v. *Eagle-Picher Mining & Smelting Co.*, 325 U. S. 335, 340 (1945):

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* Document 15, Middle South Exhibit D-14, Annual Report 1951, p. 11. This is listed at R. 69 and, although not a part of the printed record, has been lodged with this Court and may be referred to by any party in briefs or arguments pursuant to stipulation herein dated December 28, 1956.

"Finality to litigation is an end to be desired as well in proceedings to which an administrative body is a party as in exclusively private litigation."

Middle South Utilities, Inc., therefore, is opposed to any modification of the judgment below which would reopen the entire case under Section 11(b)(1) of the Act as it applies to the Middle South system as a whole.

Conclusion.

This appeal should be disposed of by affirming the judgment below without modification or by other disposition of the appeal which will not impair the integrity of the SEC integration order of March 20, 1953 (R. 127-128).

Dated: April 18, 1957.

Respectfully submitted,

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Counsel for Middle South Utilities, Inc.